300. North Kansas City, MO
301. North Liberty, IA
302. North Richland Hills, TX
303. Northbrook, IL
304. Northern Berkshire Comm TV Corp, MA
305. Northern Dakota County Cable Comm Comm'm
306. Northwest Suburbs Cable Commun Comm'n, MN
307. Norwalk, CA
308. Oceanside Comm TV, CA
309. Onslow Cnty, NC
310. Ontario, CA
311. Orange County, FL
312. Organization for the Promotion and Advancement of Small Telecommunications Companies
313. Orion Neighborhood TV, MI
314. Oxford, NC
315. Pacific Research Institute
316. Pac-West Telecomm, Inc.
317. Palmetto, FL
318. Palo Alto, CA (on behalf of Joint Powers)
319. Pasadena, CA
320. Patton, PA
321. Peachtree City, GA
322. Pennsville, NJ
323. Perris, CA
324. Philadelphia, PA
325. Pike County, Kentucky
326. Pike County, KY
327. Pikeville, Kentucky
328. Pikeville, KY
329. Pinetops, NC
330. Pittsboro, NC
331. Plainfield, MI
332. Pleasant Garden, NC
333. Pleasant Hill, CA
334. Plymouth, MA
335. Pocatello, ID
336. Post Falls, ID
337. Poway, CA
338. Prince George's Community TV, Inc.
339. Prince George's County, MD
340. Princeton Community TV, NJ
341. Public Cable Television Authority
342. Public Utility Commission of Texas
343. Public, Educational and Government Access Oversight Comm of Metro Nashville
344. Queen Anne's County, MD
345. Quote Unquote, NM
346. Qwest Communications International Inc.
347. Ramsey/Washington Counties Suburban Cable Commun. Comm'n, MN
348. Rancho Cordova, CA
349. Rancho Santa Margarita, CA
350. Randolph County, NC

351. RCN Telecom Services, Inc.
352. Red Oak, NC
353. Redding, CA
354. Reidsville, NC
355. Renton, WA
356. Richmond, KY
357. River Bend, NC
358. Rockingham County, NC
359. Rockwell, NC
360. Rolling Hills Estates, CA
361. Rowan County, NC
362. Sacramento Metro Cable TV Commission, CA
363. Saint Charles, MO
364. Salem, OR
365. Salt Lake City, UT
366. San Diego, CA
367. San Dimas, CA
368. San Jose, CA
369. San Juan Capistrano, CA
370. San Marcos, CA
371. San Mateo County Telecomm Auth, CA
372. Sanford, NC
373. Santa Clara, CA
374. Santa Clarita, CA
375. Santa Cruz County Community TV
376. Santa Rosa, CA
377. Santee, CA
378. Saratoga Springs, NY
379. Scotts Valley, CA
380. Seattle, WA
381. Sebastopol, CA
382. Self-Advocacy Association of New York State, Inc.
383. Shaler, PA
384. Sierra Madre, CA
385. Signal Hill, CA
386. Siler City, NC
387. Simi Valley, CA
388. Sjoberg's, Inc.
389. Skokie, IL
390. Smithfield, NC
391. Solana Beach, CA
392. South Orange Village, NJ
393. South Portland, ME
394. South San Francisco, CA
395. South Slope Cooperative Telephone Company
396. Southeast Michigan Municipalities
397. Southwest Suburban Cable Commission (SWSCC)
398. Spring Hope, NC
399. Springfield, MO
400. St. Charles, IL
401. St. Paul, MN*

402. St. Petersburg, FL
403. Standish, ME
404. State College Bourough, PA
405. State of Hawaii
406. Statesville, NC
407. Sun Prairie Cable Access TV, WI
408. Sunapee, NH*
409. Sunnyvale, CA
410. Susanville, CA
411. Tabor City, NC
412. Tampa, FL
413. Taylor, MI
414. Telco Retirees Association, Inc.
415. Telecommunications Industry Association
416. Temecula, CA
417. Texas Coalition of Cities for Utility Issues (TCCFUI)
418. Texas Municipal League and the Texas City Attorneys Association
419. The Progress & Freedom Foundation
420. Time Warner Cable
421. Tobaccoville, NC
422. Toppenish, WA
423. Torrance, CA
424. Truckee, CA
425. Tulsa, OK
426. Tuolumne, CA
427. Ukiah, CA
428. United States Internet Industry Association
429. United States Telecom Association
430. United States-Mexico Chamber of Commerce
431. URTV Asheville, NC
432. Valley Voters Organized Toward Empowerment
433. Vancouver Educational Telecommunications Consortium (VETC)
434. Vass, NC
435. Verizon
436. Vermont Public Service Board (VPSB)
437. Video Access Alliance
438. Villages of Larchmont & Mamaroneck, NY
439. Virginia Cable Telecommunications Association (VCTA)
440. Vista, CA
441. Wake Forest, NC
442. Walnut Creek, CA
443. Walnut Creek, California
444. Warrenville, IL
445. Washington State Grange
446. Wayland, MA
447. Wendell, NC
448. West Allis, WI
449. West Palm Beach, FL
450. Westport, WI
451. Wheaton, IL
452. Whitakers, NC

453. White Plains Cable Access TV, NY
454. White, SD
455. Whittier, CA
456. Wilbraham, MA
457. Wilson, NC
458. Winchester, KY & KY Regional Cable Comm.
459. Windham Community TV, NH
460. Winston-Salem, NC
461. Wisconsin Association of Public, Educational and Government Access Channels (WAPC)
462. Women Impacting Public Policy
463. Worchester, MA
464. World Institute on Disability
465. Yanceyville, NC
466. Yuma, AZ
467. Zebulon, NC
468. Zeeland, MI

APPENDIX B

Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 –MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. Revise Subpart C title to read as follows:

Subpart C – Cable Franchise Applications

2. Insert into new Subpart C the following:

§76.41 Franchise Application Process

(a) Definition. *Competitive Franchise Applicant.* For the purpose of this section, an applicant for a cable franchise in an area currently served by another cable operator or cable operators in accordance with 47 U.S.C. § 541(a)(1).

(b) A competitive franchise applicant must include the following information in writing in its franchise application, in addition to any information required by applicable state and local laws:

(1) the applicant's name;

(2) the names of the applicant's officers and directors;

(3) the business address of the applicant;

(4) the name and contact information of a designated contact for the applicant;

(5) a description of the geographic area that the applicant proposes to serve;

(6) the PEG channel capacity and capital support proposed by the applicant;

(7) the term of the agreement proposed by the applicant;

(8) whether the applicant holds an existing authorization to access the public rights-of-way in the subject franchise service area as described under subsection (b)(5);

(9) the amount of the franchise fee the applicant offers to pay; and

(10) any additional information required by applicable state or local laws.

(c) A franchising authority may not require a competitive franchise applicant to negotiate or engage in any regulatory or administrative processes prior to the filing of the application.

(d) When a competitive franchise applicant files a franchise application with a franchising authority and the applicant has existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority must grant or deny the application within 90 days of the date the application is received by the franchising authority. If a competitive franchise applicant does not have existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority must grant or deny the application within 180 days of the date the application is received by the franchising authority. A franchising authority and a competitive franchise applicant may agree in writing to extend the 90-day or 180-day deadline, whichever is applicable.

e) If a franchising authority does not grant or deny an application within the time limit specified in subsection (d), the competitive franchise applicant will be authorized to offer service pursuant to an interim franchise in accordance with the terms of the application submitted under subsection (b).

f) If after expiration of the time limit specified in subsection (d) a franchising authority denies an application, the competitive franchise applicant must discontinue operating under the interim franchise specified in subsection (e) unless the franchising authority provides consent for the interim franchise to continue for a limited period of time, such as during the period when judicial review of the franchising authority's decision is pending. The competitive franchise applicant may seek judicial review of the denial under 47 U.S.C. § 555.

g) If after expiration of the time limit specified in subsection (d) a franchising authority and a competitive franchise applicant agree on the terms of a franchise, upon the effective date of that franchise, that franchise will govern and the interim franchise will expire.

APPENDIX C

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the "RFA"),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact of the policies and rules proposed in the *Further Notice of Proposed Rulemaking* ("*Further Notice*") on a substantial number of small entities.[2] Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice* provided in paragraph 145 of the item. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[3] In addition, the *Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[4]

A. Need for, and Objectives of, the Proposed Rules

2. The *Further Notice* continues a process to implement Section 621(a)(1) of the Communications Act of 1934, as amended, in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment as discussed in the *Report and Order* ("*Order*"). Specifically, the *Further Notice* solicits comment on whether the Commission should apply the rules and guidelines adopted in the *Order* to cable operators that have existing franchise agreements, and if so, whether the Commission has authority to do so. The *Further Notice* also seeks comment on whether the Commission can preempt state or local customer service laws that exceed Commission standards.

B. Legal Basis

3. The *Further Notice* tentatively concludes that the Commission has authority to apply the findings in the *Order* to cable operators with existing franchise agreements. In that regard, the *Further Notice* finds that neither Section 611(a) nor Section 622(a) distinguishes between incumbents and new entrants or franchises issued to incumbents and franchises issued to new entrants.[5]

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[6] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[7] In addition, the term "small business" has the

[1] The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603. Although we are conducting an IRFA at this stage in the process, it is foreseeable that ultimately we will certify this action pursuant to the RFA, 5 U.S.C. § 605(b), because we anticipate at this time that any rules adopted pursuant to this *Notice* will have no significant economic impact on a substantial number of small entities.

[3] *See* 5 U.S.C. § 603(a).

[4] *See* 5 U.S.C. § 603(a).

[5] *See* 47 U.S.C. §§ 531(a), 542(a).

[6] 5 U.S.C. § 603(b)(3).

[7] 5 U.S.C. § 601(6).

same meaning as the term "small business concern" under the Small Business Act.[8] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[9]

5. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.[10]

6. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.[11]

7. The Commission has determined that the group of small entities possibly directly affected by the proposed rules herein, if adopted, consists of small governmental entities. A description of these entities is provided below. In addition the Commission voluntarily provides descriptions of a number of entities that may be merely indirectly affected by any rules that result from the *Further Notice.*

Small Governmental Jurisdictions

8. The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[12] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[13] This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2 percent) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

Miscellaneous Entities

9. The entities described in this section are affected merely indirectly by our current action, and therefore are not formally a part of this RFA analysis. We have included them, however, to broaden the record in this proceeding and to alert them to our tentative conclusions.

Cable Operators

10. The "Cable and Other Program Distribution" census category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $13.0 million or less in revenue annually.[14] According to Census Bureau data for 1997, there were a total of

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[8] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[9] 15 U.S.C. § 632.

[10] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

[11] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[12] 5 U.S.C. § 601(5).

[13] U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

[14] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) 517510.

1,311 firms in this category, total, that had operated for the entire year.[15] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

11. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small-business-size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[16] The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.[17] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

12. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[18] The Commission has determined that there are 67,700,000 subscribers in the United States.[19] Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[20] Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.[21] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[22] and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

13. *Open Video Services.* Open Video Service ("OVS") systems provide subscription services.[23] As noted above, the SBA has created a small business size standard for Cable and Other

[15] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

[16] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *See Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

[17] Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995).

[18] 47 U.S.C. § 543(m)(2).

[19] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (2001).

[20] 47 C.F.R. § 76.901(f).

[21] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operators, Public Notice, DA 01-0158 (2001).

[22] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[23] *See* 47 U.S.C. § 573.

Program Distribution.[24] This standard provides that a small entity is one with $13.0 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.[25] Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

14. We anticipate that any rules that result from this action would have at most a *de minimis* impact on small governmental jurisdictions (*e.g.*, one-time proceedings to amend existing procedures regarding the method of granting competitive franchises). Local franchising authorities ("LFAs") today must review and decide upon competitive cable franchise applications, and will continue to perform that role upon the conclusion of this proceeding; any rules that might be adopted pursuant to this *Notice* likely would require at most only modifications to that process.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

15. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[26]

16. As discussed in the *Further Notice*, Sections 611(a) and 622(a) do not distinguish between new entrants and cable operators with existing franchises.[27] As discussed in the *Order*, the Commission has the authority to implement the mandate of Section 621(a)(1) to ensure that LFAs do not unreasonably refuse to award competitive franchises to new entrants, and adopts rules designed to ensure that the local franchising process does not create unreasonable barriers to competitive entry for new entrants. Such rules consist of specific guidelines (*e.g.*, maximum timeframes for considering a competitive franchise application) and general principles regarding franchise fees designed to provide LFAs with the guidance necessary to conform their behavior to the directive of Section 621(a)(1). As noted above, applying these rules regarding the franchising process to cable operators with existing franchises likely would have at most a *de minimis* impact on small governmental jurisdictions. Even if that were not the case, however, we believe that the interest of fairness to those cable operators would outweigh any impact on small entities. The alternative (*i.e.*, continuing to allow LFAs to follow procedures that are unreasonable) would be unacceptable, as it would be inconsistent with the Communications Act. We seek comment on the impact that such rules might have on small entities, and on what effect alternative rules would have on those entities. We also invite comment on ways in which

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[24] 13 C.F.R. § 121.201, NAICS code 517510.

[25] *See* http://www.fcc.gov/mb/ovs/csovscer.html (visited December 19, 2006), http://www.fcc.gov/mb/ovs/csovsarc.html (visited December 19, 2006).

[26] 5 U.S.C. §§ 603(c)(1)-(4).

[27] 47 U.S.C. §§ 531(a), 542(a).

the Commission might implement the tentative conclusions while at the same time imposing lesser burdens on small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

17. None.

APPENDIX D

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rulemaking* ("*NPRM*") to this proceeding.[2] The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission received one comment on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need for, and Objectives of, the Report and Order

2. This Report and Order ("*Order*") adopts rules and provides guidance to implement Section 621 of the Communications Act of 1934, as amended (the "Communications Act").[4] Section 621 of the Communications Act prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services.[5] The Commission has found that the current franchising process constitutes an unreasonable barrier to entry for competitive entrants that impedes enhanced cable competition and accelerated broadband deployment. The Commission also has determined that it has authority to address this problem. To eliminate the unreasonable barriers to entry into the cable market, and to encourage investment in broadband facilities, in this *Order* the Commission (1) adopts maximum time frames within which local franchising authorities ("LFAs") must grant or deny franchise applications (90 days for new entrants with existing access to rights-of-way and six months for those who do not); (2) prohibits LFAs from imposing unreasonable build-out requirements on new entrants; (3) identifies certain costs, fees, and other compensation which, if required by LFAs, must be counted toward the statutory 5 percent cap on franchise fees; (4) interprets new entrants' obligations to provide support for PEG channels and facilities and institutional networks ("I-Nets"); and (5) clarifies that LFA authority is limited to regulation of cable services, not mixed-use services. The Commission also preempts local laws, regulations, and franchise agreement requirements, including level-playing-field provisions, to the extent they impose greater restrictions on market entry for competitive entrants than what the *Order* allows. The rule and guidelines are adopted in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. For the specific language of the rule adopted, see Appendix B.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. Only one commenter, Sjoberg's, Inc. submitted a comment that specifically responded to the IRFA. Sjoberg's, Inc. contends that small cable operators are directly affected by the adoption of rules that treat competitive cable entrants more favorably than incumbents. Sjoberg's Inc. argues that small cable operators are not in a position to compete with large potential competitors. These arguments were considered and rejected as discussed below.

4. We disagree with Sjoberg's Inc. assertion that our rules will treat competitive cable

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[2] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 20 FCC Rcd 18581 (2005) ("*NPRM*").

[3] *See* 5 U.S.C. § 604.

[4] 47 U.S.C. § 541(a)(1).

[5] *Id.*

entrants more favorably than incumbents. While the actions we take in the *Order* will serve to increase competition in the multichannel video programming ("MVPD") market, we do not believe that the rules we adopt in the *Order* will put any incumbent provider at a competitive disadvantage. In fact, we believe that incumbent cable operators are at a competitive advantage in the MVPD market; incumbent cable operators have the competitive advantage of an existing customer base and significant brand recognition in their existing markets. Furthermore, we ask in the *Further Notice of Proposed Rulemaking* whether the findings adopted in the *Order* should apply to existing cable operators and tentatively conclude that they should.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

Entities Directly Affected By Proposed Rules

5. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.[6] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction."[7] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[8] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[9]

6. The rules adopted by this *Order* will streamline the local franchising process by adopting rules that provide guidance as to what constitutes an unreasonable refusal to grant a cable franchise. The Commission has determined that the group of small entities directly affected by the rules adopted herein consists of small governmental entities (which, in some cases, may be represented in the local franchising process by not-for-profit enterprises). Therefore, in this FRFA, we consider the impact of the rules on small governmental entities. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

7. *Small governmental jurisdictions.* Small governmental jurisdictions are "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[10] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[11] This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2 percent) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

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[6] 5 U.S.C. § 603(b)(3).

[7] *Id.* § 601(6).

[8] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[9] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[10] 5 U.S.C. § 601(5).

[11] U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

Miscellaneous Entities

8. The entities described in this section are affected merely indirectly by our current action, and therefore are not formally a part of this RFA analysis. We have included them, however, to broaden the record in this proceeding and to alert them to our conclusions.

Cable Operators

9. The "Cable and Other Program Distribution" census category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $13.0 million or less in revenue annually.[12] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[13] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

10. Cable System Operators (Rate Regulation Standard). The Commission has developed its own small-business-size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[14] The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.[15] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

11. Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[16] The Commission has determined that there are 67,700,000 subscribers in the United States.[17] Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[18] Based on available data, the Commission estimates that the

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[12] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517510.

[13] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

[14] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *See Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

[15] Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995).

[16] 47 U.S.C. § 543(m)(2).

[17] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (2001).

[18] 47 C.F.R. § 76.901(f).

number of cable operators serving 677,000 subscribers or fewer, totals 1,450.[19] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[20] and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

12. Open Video Services. Open Video Service ("OVS") systems provide subscription services.[21] As noted above, the SBA has created a small business size standard for Cable and Other Program Distribution.[22] This standard provides that a small entity is one with $13.0 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.[23] Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

Telecommunications Service Entities

13. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[24] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[25] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

14. *Incumbent Local Exchange Carriers ("LECs").* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[26] According to

[19] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operators, Public Notice, DA 01-0158 (2001).

[20] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

[21] *See* 47 U.S.C. § 573.

[22] 13 C.F.R. § 121.201, NAICS code 517510.

[23] *See* http://www.fcc.gov/mb/ovs/csovscer.html (visited December 19, 2006), http://www.fcc.gov/mb/ovs/csovsarc.html (visited December 19, 2006).

[24] 15 U.S.C. § 632.

[25] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[26] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

Commission data,[27] 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[28]

15. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[29] According to Commission data,[30] 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are "Shared-Tenant Service Providers," and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are "Other Local Service Providers." Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[31]

D. Description of Projected Reporting, Record Keeping and other Compliance Requirements

16. The rule and guidance adopted in the *Order* will require *de minimus* additional reporting, record keeping, and other compliance requirements. The most significant change requires potential franchisees to file an application to mark the beginning of the franchise negotiation process. This filing requires minimal information, and we estimate that the average burden on applicants to complete this application is one hour. The franchising authority will review this application in the normal course of its franchising procedures. The rule will not require any additional special skills beyond any already needed in the cable franchising context.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant alternatives that it has considered

[27] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (June 2005) ("Trends in Telephone Service"). This source uses data that are current as of October 1, 2004.

[28] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513310 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 20,815 to 27, 891. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[29] 13 C.F.R. § 121.201, NAICS code 517110.

[30] "Trends in Telephone Service" at Table 5.3.

[31] *See supra* note 28.

in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[32]

18. In the *NPRM*, the Commission sought comment on the impact that rules interpreting Section 621(a)(1) might have on small entities, and on what effect alternative rules would have on those entities. The Commission also invited comment on ways in which the Commission might implement Section 621(a)(1) while at the same time impose lesser burdens on small entities. The Commission tentatively concluded that any rules likely would have at most a *de minimis* impact on small governmental jurisdictions, and that the interrelated, high-priority federal communications policy goals of enhanced cable competition and accelerated broadband deployment necessitated the establishment of specific guidelines for LFAs with respect to the process by which they grant competitive cable franchises. We agree with those tentative conclusions, and we believe that the rules adopted in the *Order* will not impose a significant impact on any small entity.

19. In the *Order*, we provide that LFAs should reasonably review franchise applications within 90 days for entities existing authority to access rights-of way, and within six months for entities that do not have such authority. This will result in decreasing the regulatory burdens on cable operators. We declined to adopt shorter deadlines that commenters proposed (*e.g.*, 17 days, one month) in order to provide small entities more flexibility in scheduling their franchise negotiation sessions. In the *Order*, we also provide guidance on whether an LFA may reasonably refuse to award a competitive franchise based on certain franchise requirements, such as build-out requirements and franchise fees. As an alternative, we considered providing no guidance on any franchising terms. We conclude that the guidance we provide minimizes any adverse impact on small entities because it clarifies the terms within which parties must negotiate, and should prevent small entities from facing costly litigation over those terms.

F. Report to Congress

20. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the *Small* Business Regulatory Enforcement Fairness Act of 1996.[33] In addition, the Commission will send a copy of the *Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[34]

[32] 5 U.S.C. § 603(c)(1)-(c)(4)

[33] *See* 5 U.S.C. § 801(a)(1)(A).

[34] *See id.* § 604(b).

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)

Greater competition in the market for the delivery for multichannel video programming is a primary and long-standing goal of federal communications policy. In passing the 1992 Cable Act, Congress recognized that competition between multiple cable systems would be beneficial, would help lower cable rates, and specifically encouraged local franchising authorities to award competitive franchises. Section 621 of the statute reads, "A franchising authority may not grant an exclusive franchise and *may not unreasonably refuse to award an additional competitive franchise*."

Telephone companies are investing billions of dollars to upgrade their networks to provide video. As new providers began actively seeking entry into video markets, we began to hear that some local authorities were making the process of getting franchises unreasonably difficult, despite clear statutory language. The record collected by the Commission in this proceeding cited instances where LFAs sat on applications for more than a year or required extraordinary in kind contributions such as the building of public swimming pools and recreation centers.

Such unreasonable requirements are especially troubling because competition is desperately needed in the video market. As we just found, from 1995 to 2005, cable rates have risen 93%. In 1995 cable cost $22.37 per month. Last year, cable cost $43.04 per month. Today's Communications Daily reports that prices for expanded basic are now about $50 per month. The trend in pricing of cable services is of particular importance to consumers. Since 1996 the prices of every other communications service have declined while cable rates have risen year after year after year.

This item appropriately removes such regulatory barriers by giving meaning to the words Congress wrote in section 621 of the Cable Act. Specifically, the Commission finds that an LFA is unreasonably refusing to grant a competitive franchise when it does not act on an application within a reasonable time period, imposes taxes on non-cable services such as broadband, requires a new entrant to provide unrelated services or imposes unreasonable build-out requirements.

The widespread deployment of broadband remains my top priority as Chairman and a major Commission objective. During my tenure as Chairman, the Commission has worked hard to create a regulatory environment that promotes broadband deployment. We have removed legacy regulations, like tariffs and price controls, that discourage carriers from investing in their broadband networks, and we worked to create a regulatory level playing-field among broadband platforms. And we have begun to see some success as a result of the Commission's policies. High-speed connections to the Internet have grown over 400% since I became Commissioner in July 200.

The ability to deploy broadband networks rapidly however, is intrinsically linked to the ability to offer video to consumers. As the Commission stated in the Notice in this proceeding: "The construction of modern telecommunications facilities requires substantial capital investment and such networks, once completed, are capable of providing not only voice and data, but video as well. As a consequence, the ability to offer video offers the promise of an additional revenue stream from which deployment costs can be recovered."

Similarly, in a 2005 Policy Paper, the Phoenix Center found that video is "is now the key driver for new fiber deployment in the residential market." The Phoenix Center went on to say that: "If a new entrant cannot readily provide consumers multichannel video over an advanced network, then the prospects for success will be diminished substantially due to a reduction in the entrant's potential revenues. Quite simply, the ability to sell video services over these fiber networks may be a crucial factor in getting those fiber networks deployed." By enhancing the ability of new entrants to provide video services then we are advancing our goal of universal affordable broadband access for Americans, as well as our goal of increased video competition.

I am also committed to seeing that consumers are able to realize the benefits of competition in the forms of better services and lower prices. In recent years however, consumers have had limited choice among video services providers and ever increasing prices for those services. But as was just demonstrated in our annual price survey, cable competition can impact cable bills. Again, it found that only in areas where there was competition from a second cable operator did average price for cable service decrease. I am pleased that the steps taken by the Commission today will expressly further this type of competition and help ensure that lower prices are available to as many Americans as possible as quickly as possible.

Addressing build-out requirements was particularly difficult. This item seeks to strike a balance between encouraging as widespread deployment of broadband as possible while not deterring entry altogether. I believed it would have been appropriate to provide examples of build-out requirements that would be reasonable in addition to illustrating those that could not be.[1]

[1] For example, I would have been willing to find that it would seem reasonable for an LFA to require that, beginning five years after the effective date of a new entrant's franchise and every 3 years thereafter, if in the portion of the franchise area where the new entrant has chosen to offer cable service at least 15 percent of the households subscribe to such service, the new entrant increase by 20 percent the households in the franchise area to which the new entrant offers cable service by the beginning of the next 3-year interval, until the new entrant is capable of providing cable service to all households in the franchise area.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)

I think that all of my colleagues and I can agree on the central importance of encouraging video competition. It is abundantly clear that cable rates are rising faster than inflation and that wireline cable competition can be helpful in bringing those rates down. Consumers deserve rules that will bring such competition to their doorsteps because consumers are not being well-served by the lack of competition today.

I think my colleagues and I can also agree on the central importance of broadband deployment. As I have often pointed out, our nation is falling behind in the international broadband race. Encouraging new entrants into the video market could at least assist in the challenge of building out broadband infrastructure, although it doesn't represent anything near the totality of what a real broadband strategy would look like.

But agreeing on the many benefits of video competition is hardly the same thing as coming up with rules that will actually encourage honest-to-goodness competition within the framework of the statutes that Congress has given us. The item before us today doesn't get us there and I cannot support it as written.

In recent days we had discussions attempting to craft an item with which I would feel more comfortable. Chairman Martin engaged in those discussions in good faith and I thank him for that. My goal was to encourage an item that preserves a local authority's statutory right to seek specific and far-reaching build-out requirements, protects each community's ability to negotiate for PEG and I-NET facilities, and maintains truly meaningful local ability to deal with the huge companies that are coming into our cities and towns to build important infrastructure.

Throughout the consideration of this item and even as we discussed ways to improve it in recent days, I have been troubled at the lack of a granular record that would demonstrate that the present franchising system is irretrievably broken and that traditional federal-state-local relationships have to be so thoroughly upended. If we are going to preempt and upend the balances inherent in long-standing federal-state-local jurisdictional authorities, we should have a record clearly demonstrating that those local authorities are not up to the task of handling this infrastructure build-out and that competition can be introduced only by preempting and upsetting these long-standing principles of federalism. My colleagues may recall that when we launched the NPRM on this item, I made it very clear how important the compilation of a compelling granular record would be in my consideration of this proceeding. I do not believe that either today's item or the record behind it makes such a showing. The various examples of "unreasonable" franchise requirements that the item enumerates are not closely or carefully supported by the record and often fail to rise beyond isolated episodes or anecdotal evidence.

Many people questioned, and continue to question, the Commission's legal authority to do what it is doing today. It is clear that those questions remain and that the Commission has been asked by those with oversight powers to more conclusively demonstrate our authority to undertake the actions we initiate today. I believe it is the better course of wisdom in so far-reaching a proceeding, in light of the concern being expressed by those with oversight responsibilities of this Commission, to thoroughly answer those questions, to lay out the basis of our claimed legal authority, and to explain what legal risks this action entails before taking action. Under the circumstances, proceeding on such a controversial decision today does not put an end to this issue. It only invites more delay, more confusion, and more possibility of legal challenge.

As we face the challenge of providing ubiquitous high-speed broadband to all our citizens, we need the certainty of a national strategy to get the job done. Right now this nation is hobbled because it has no such strategy, no plan for the infrastructure build-out our people need to be productive and competitive citizens of the world. The United States is ranked number twenty-one in the International Telecommunications Union's Digital Opportunity Index. It is difficult to take much comfort from being twenty-first in the Twenty-first century. The kind of broadband strategy I am talking about demands a level of consensus and national buy-in by the many diverse interests and entities that would be responsible for implementing it. While I have never equated franchise reform as anything remotely equivalent to a national broadband strategy, I do believe a properly-crafted and legally-certain franchising reform could facilitate some level of broadband build-out. That is what I attempted to work toward here. But if our decision is only going to increase concern, increase the questions and increase the risk, then I think we should pause, take a deep breath, answer the questions and reach out for more consensus. I don't say unanimity, of course, but at least a level of comfort that builds an environment wherein the next few years can see the job actually getting done rather than spent in contentious debate or court challenge because our reasoning was deemed inadequate.

So I thank my colleagues, and especially the Chairman, for the discussions we have had—discussions that were both in good faith and substantive—but in light of the concerns I have just discussed, I cannot support this afternoon's outcome. Unlike so many other proceedings coming before the Commission, I was nowhere near certain as I came to work this morning how the vote on this item would go. I actually thought that perhaps we would take the short time needed, answer the questions that had been posed, and then reassess where we were as to proceeding with an item. That was my preference. Instead it appears a majority will proceed to approve an item that, as drafted right now, is without important enhancements I have been advocating and without sufficient buy-in from the world beyond the FCC to assure its effectiveness. I must therefore respectfully dissent.

DISSENTING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)

The policy goals of this *Order*, to promote competitive video offerings and broadband deployment, are laudable. But while I support these goals, today's item goes out on a limb in asserting federal authority to preempt local governments, and then saws off the limb with a highly dubious legal scheme. It substitutes our judgment as to what is reasonable – or unreasonable – for that of local officials – all in violation of the franchising framework established in the Communications Act.

Today's *Order* is certain to offend many in Congress, who worked long and hard on this important issue, only to have a Commission decision rushed through with little consultation. The result will be heavy oversight after-the-fact, and a likely rejection by the courts. It will solve nothing, create much confusion, and provide little certainty or progress on our shared goal of promoting real video competition and universal broadband deployment.

This outcome is disappointing because I believe we must do everything we can to encourage competitive video offerings. As I was driving to work this morning, I saw a line of Verizon trucks installing FiOS in my neighborhood. I must admit, I am very excited about this new service, and plan to subscribe. FiOS is now available because our local county officials approved a franchise for Verizon. If they had not, I imagine many of my neighbors would have complained loudly. Maybe that is why Verizon has repeatedly told Wall Street investors, "[e]ven in those states where we don't have the whole state, places like Pennsylvania, we have become very successful now in getting franchising. So we don't see that as an issue going forward."[1] I am pleased with their efforts and their success, and want to encourage their continued investment.

As I said in the underlying *Notice of Proposed Rule Making*, "Congress clearly sought to promote competitive cable offerings and to facilitate the approval of competitive cable franchises in the Cable Act of 1992."[2] I agree the Commission should do what it can within the current legal framework to facilitate increased video competition because it benefits American consumers, promotes U.S. deployment of broadband networks and services, and enhances the free exchange of ideas in our democratic society.

Notwithstanding these worthy goals, I, unfortunately, cannot support this *Order* because the FCC is a regulatory agency, not a legislative body. In my years working on Capitol Hill, I learned enough to know that today's *Order* is legislation disguised as regulation. The courts will likely reverse such action because the Commission cannot act when it "does not really define specific statutory terms, but rather takes off from those terms and devises a comprehensive regulatory regimen.... This extensive quasi-legislative effort to implement the statute does not strike [me] as merely a construction of statutory phrases."[3]

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[1] *Final Transcript,* Thomson StreetEvents, VZ-Verizon at UBS 34th Annual Global Media Conference, Dec. 6, 2006, at page 7, available at, http://investor.verizon.com/news/20061206/20061206_transcript.pdf.

[2] Statement of Commissioner Jonathan S. Adelstein, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Notice of Proposed Rulemaking, FCC 05-180 (rel. Nov. 18, 2005) ("*Local Franchising NPRM*").

[3] *Kelley v. E.P.A.*, 15 F.3d 1100, 1108 (DC. Cir. 1994). While the Commission contends that "[d]espite the parameters established by the Communications Act, ... operation of the franchising process has proven far more (continued...)

Today's *Order* is disappointing because while there is bipartisan agreement that the current video franchising framework should be refined to better reflect marketplace realities, technological advancement, and consumer demands, the decision skips the fine-tuning and performs an extreme makeover. The majority accomplishes today what the elected representatives of the American people have tried to do through the legislative process. In doing so, the Commission not only disregards current law and exceeds its authority, but it also usurps congressional prerogatives and ignores the plain meaning of Title VI, the cannons of statutory construction, and the judicial remedy Congress already provided for unreasonable refusals. In crafting a broadly aggressive and legally tenuous solution, the majority attempts the legal equivalent of triple axels and quadruple toe loops that would only impress an Olympic judge who is willing to overlook slips, stumbles, and falls.

We might keep in mind former President Ronald Reagan's views on federalism and the role of local governments. In his first State of the Union Address, President Reagan exhorted Americans to give power back to local governments:

> Together, after 50 years of taking power away from the hands of the people in their states and local communities we have started returning power and resources to them. ... Some will also say our states and local communities are not up to the challenge of a new and creative partnership. Well, that might have been true 20 years ago. ... It's no longer true today. This Administration has faith in state and local governments and the constitutional balance envisioned by the Founding Fathers.[4]

More recently, President George W. Bush echoed this trust in local government, asserting that "government closest to the people is more responsive and accountable."[5] While the Commission has long viewed the cable franchising process as "a deliberately structured dualism,"[6] today's decision is a clear rebuke of this storied relationship with local government.

Congressional action in 1984, 1992, and 1996 re-affirmed further that it is Congress' intent that "the franchise process take[s] place at the local level where city officials have the best understanding of local communities' needs and can require cable operators to tailor the cable system to meet those needs."[7] This is clearly set forth in the purposes of Title 6, wherein Congress made clear that Title 6 would establish the proper local, state and federal roles.[8] Congress established a framework whereby state and local authorities, within certain federal limits, are primarily responsible for the administration of the franchising process. That process is inherently local and fact-specific. Indeed, a one-size-fits-all

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complex and time consuming than it *should be*," (Order, ¶ 3), the proper inquiry is whether the franchising process is operating *as Congress intended*. Today's *Order* ignores this important question. In so doing, the Commission disregards the parameters established in the Cable Act and imposes its view of how the franchising process *should be*.

[4] President Ronald Reagan, *State of the Union Address*, January 26, 1982, available at, http://www.reagan.utexas.edu/archives/speeches/1982/12682c.htm.

[5] George W. Bush, "What the Congress Can Do For America," WALL ST. J., January 3, 2007, at A13.

[6] *Cable Television Report and Order*, 36 F.C.C. 2d 143, 207 ¶177, *recon.*, 36 F.C.C. 2d 326 (1972).

[7] H.R. Rep. No. 934, 98th Congress, 2d Sess. at 24.

[8] 47 U.S.C. § 521 (3).

approach is antithetical to clear congressional intent that cable systems be "responsive to needs and interests of local community."[9]

To be sure, the franchising process is not perfect and, by definition, negotiations may result in some delay. But Congress, after much deliberation, created this process to achieve certain stated policy objectives, which are clearly set out in the Act. [10] Regardless of how commenters now feel about this carefully calibrated and negotiated balance, Congress delegated authority to state and local governments to make certain decisions and to determine the merit of granting cable franchises in their respective communities. It then set forth a judicial remedy if a party is aggrieved by a denial of franchising.[11] While Congress has the power to revisit this scheme, and has strongly considered doing so, until then this Commission must adhere to the law as written.

Yet today, the Commission is federalizing the franchising process, taking it upon itself to decide, in every local dispute, what is "unreasonable," without actually looking at specific, local examples to determine the real situation.[12] Instead of acknowledging the vast dispute in the record as to whether there are actually any unreasonable refusals being made today, the majority simply accepts in every case that the phone companies are right and the local governments are wrong, all without bothering to examine the facts behind these competing claims, or conduct any independent fact-finding. This is breathtaking in its disrespect of our local and state government partners and in its utter disregard for agency action based on a sound record.

Today's *Order* also displays a fundamental misunderstanding about the commitment of franchising authorities to bring competition to their citizens. By law, a franchise under Title 6 confers a right of access to people's property.[13] Unlike members of this Commission, many state and local officials are elected and directly accountable to their citizens. Our knee-jerk embrace of everything interested companies say while discounting local elected officials on a matter grounded in local property rights certainly does not inspire a great deal of confidence in the Commission's ability on the federal level to arbitrate every local dispute in the country and fairly decide who is unreasonable and who is not. Even if the Commission had such power, there is no mechanism outlined in this *Order* to establish how that process would work. Consequently, the end result will likely be litigation, confusion, abuse of the process, and a certain amount of chaos. It is sadly ironic that this agency, which has been recently in violation of one of its own 90 day statutory deadlines, is telling localities to do as I say, not as I do.[14]

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[9] 47 U.S.C. § 521(2).

[10] One of the principal purposes of Title VI is to "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2).

[11] 47 U.S.C. § 555.

[12] See Letter from David L. Smith, City Attorney, City of Tampa , to Kevin Martin, Chairman, FCC, dated January 5, 2007 (stating "[h]ow disappointing it was to learn that ... the FCC would embrace as truth an allegation in a rulemaking that has such far-reaching implications to so many, without doing any follow-up with the jurisdiction named to confirm it accuracy.").

[13] *See* 47 U.S.C. § 541 (a)(2).

[14] See, e.g., In the Matter of Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.120(a)(1), CSR-7017-Z, CS Docket No 97-80, DA-06-2543, CS Docket No 97-80, filed 4/19/06 (waiver proceeding placed on public notice 5/17/06 and decided 1/10/2007, well past the statutory "shot clock"); 47 U.S.C. § 549(c) ("the Commission shall grant any such waiver request within 90 days of any application filed under this subsection.").

Over the past two years, Congress held nearly two dozen hearings on franchising, and sought to amend the Cable Act in an effort to reform the current franchising process and "strike the right balance between national standards and local oversight."[15] Yet, the Commission has finalized in the dark of night what Congress was unable to resolve in two years of intensive public deliberations. In contrast to the Senate where I used to work, one might call the FCC the world's least deliberative body. And the final product shows it.

Congress would not have expended effort on a major piece of legislation had its members believed it was not necessary to grant the Commission explicit authority to do what the majority now contends the Commission can do under existing law. The House bill proposed a national cable franchising regime, while the Senate bill proposed an expedited competitive franchise process which would have required local authorities to issue franchises pursuant to a standard application drafted by the Commission. Today's *Order* turns federalism on its head by putting the Commission in the role of sole arbiter of what is a "reasonable" or "unreasonable" LFA practice and short-circuiting the franchising process if an arbitrary shot clock has expired.

While Congress worked to change federal law to create a role for the Commission in the franchising process, there was and continues to be considerable state and local activity to reform the local franchising process. To date, nearly half of all states have adopted state-wide franchise reform or mandatory state franchise terms, or have engaged in a democratic process to enact meaningful franchise reform legislation.[16] Hundreds of other localities have approved new franchises, and many more are in the works.

When we launched this proceeding, the central question was "whether the local franchising process truly is a hindrance to the deployment of alternative video networks, as some new entrants assert[ed]."[17] Indeed, the *Local Franchising NPRM* explicitly solicited "empirical data" and "concrete examples" regarding problems in the franchising process that FCC could resolve. In response, the record evidence provides scant, dated, isolated, and unverified examples that fall far short of demonstrating a systematic failure of state and local governments to negotiate in good faith and in a reasonable fashion.

According to the Telecommunications Industry Association, "some recent examples of overly-burdensome, and ... 'unreasonable,' extraneous obligations"[18] included: (1) Merton Group's two year negotiations with Hanover, New Hampshire, which concluded in December, 2004; (2) Knology's negotiations with Louisville, Kentucky in early 2000; (3) Knology's franchise negotiations with the greater Nashville, Tennessee area in March 2000; and (4) Grande Communication's negotiations with San Antonio and Corpus Christi, Texas in 2002. Additionally, Fiber-To-The-Home Council cites the efforts of Guadalupe Valley Telephone Cooperative to seek a franchise in the City of Bulverde, Texas in 2004. The *Order* itself relies on unconfirmed allegations by Verizon and AT&T about unreasonable demands and negotiations being drawn out over an extended period of time; and complaints by U.S. Telecom

[15] H.R. REP. No. 109-470, at 3 (2006).

[16] While the *Order* purportedly refrains from explicitly preempting "statewide franchising decisions" and only addresses "decisions made by [instrumentalities of the state, such as] county – or municipal level franchising authorities," this dubious distinction has a questionable legal basis. Under Title 6, LFAs derive their power by virtue of state law, so such distinctions are not for the FCC to make. Moreover, the Commission's contention that it does not have sufficient information in the record to consider the effect of franchising by states (some of which have had laws in place for a decade), but has sufficient record evidence to preempt 33,000 LFAs, is facially preposterous.

[17] Adelstein Statement, *Local Franchising NPRM*.

[18] Letter from Grant Seiffert, to Jonathan S. Adelstein, Commissioner, FCC, MB Docket No. 05-311 (dated December 11, 2006).

Association, Qwest, and Bell South about new entrants accepting franchise terms that they considered unreasonable in order to avoid further delay in obtaining the franchise, or, in one case, filing a "friendly lawsuit."

These examples, based on my review of the record evidence, represent the extent to which competitive video providers argue that LFAs are delaying in acting on franchise applications. However, considering the current franchising process has been in place nearly 15 years and there are over 30,000 LFAs, I find these sporadic examples, individually and collectively, wholly insufficient to justify the Commission's quasi-legislative attempt to federalize the local franchising process. These sparse allegations and anecdotal evidence do not rise to a level that warrants today's drastic, substantive measures. The Commission's blind acceptance of a few alleged instances as illustrative of a much broader problem is a poor and unfortunate reflection of the disregard for proper agency process. The Commission neither attempted to conduct any independent fact-finding or due diligence, nor verify the allegations made by parties who have a vested interest in the outcome of this proceeding.[19] Even more shocking, the Commission and the commenters fail to cite to a single actual, present day problem pending with any specific LFA.[20]

Notwithstanding the scant record evidence to justify agency preemption and the creation of a national, unified franchising process in contravention of federal law, the Commission conjures its authority to reinterpret and, in certain respects, rewrite section 621 and Title VI of the Communications Act, on just two words in section 621(a)(1)[21] – "unreasonably refuse." The Commission ignores the verb that follows: "to award." A plain reading section 621(a)(1) does not provide a wholesale "unreasonable" test for all LFA action. Rather, the statutory language focuses on the act of awarding a franchise. While I agree that the Commission has authority to interpret and implement the Communications Act, including Title VI,[22] the Commission does not have authority to ignore the plain meaning, structure and legislative history of section 621, and judicial precedent.[23]

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[19] *Local Franchising NPRM*, ¶1 ("potential competitors seeking to enter the multichannel video programming distributor ("MVPD") marketplace have alleged that in many areas the current operation of the local franchising process serves as a barrier to entry. Accordingly, this *Notice* is designed to solicit comment on implementation of Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises.")

[20] During the Commission's Agenda Meeting in Keller, Texas, on February 10, 2006, one Verizon official identified Montgomery County, Maryland, as an obstinate LFA that was insisting upon unreasonable illegal demand and delaying negotiations. Since that meeting, Verizon has in fact obtained a franchise in Montgomery County. *See* Press Release, Montgomery Country, Md., County Negotiates Cable Franchise Agreement with Verizon; Agreement Resolves Litigation, Provides Increased Competition for Cable Service (Sept. 13, 2006) (available at http://www.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=2582). In fact, this *Order* blatantly ignores public statements that significantly undermine representations some proponents of this decision have made to the Commission. For example, AT&T has publicly stated that Project Lightspeed will be available to 90% of its "high-value" customers, but to less than 5% of its "low value" neighborhoods, but today the Commission undermines a locality's ability to ensure all residents are served. Leslie Cauley, *Cable, Phone Companies Duke it out for Customers*, USA Today, May 22, 2005, available at: http://www.usatoday.com/money/media/2005-05-22-telco-tv-cover-usat_x.htm?csp=34 (last viewed 12/20/06). As Verizon's CEO of one major new entrant recently noted, "Any place it's come to a vote, we win." Dionne Searcey, *As Verizon Enters Cable Business, It Faces Local Static Telecom Giant Gets Demands As It Negotiates TV Deals*, Wall St. J., Oct. 28, 2005, at A1. Yet in today's *Order*, the Commission somehow determines that there is widespread bad faith only on the part of the LFAs, not the new entrants, in order to justify this sweeping federal preemption.

[21] 47 U.S.C. §541(a)(1).

[22] Admittedly, however, read together, sections 621(a)(1) and 635(a), clearly vest the courts, not the FCC, with exclusive jurisdiction over the determination of what constitutes "unreasonably refuse." In light of the fact that these two provisions were amended simultaneously in 1992, this is the only rational interpretation. As NATOA pointed out in its Comments, "[i]t is ludicrous to suggest that Congress, having provided that only "final" decisions

(continued...)

While the Commission purports to limit its action today to interpreting "unreasonably refuse," the *Order* stretches section 621 well beyond the meaning that the statute can bear and, consequentially, changes the franchising process in fundamental ways. There are certain salient features of today's *Order* that raise serious legal and policy implications, requiring careful scrutiny. Most notably, the *Order*: (1) imposes a 90-day shot clock on LFAs to render a decision on the franchise application of a competitive applicant with existing rights-of-way; (2) deems a competitive entrant's franchise application granted after 90-days; (3) prohibits the denial of a competitive entrant's application based upon the entrant's refusal to comply with any build-out obligations; (4) prohibits the denial of a competitive entrant's application based upon the entrant's refusal to build and support PEG and I-net; and (5) authorizes a new entrant to refrain from obtaining a franchise when it is upgrading "mixed use" facilities that will be used for the delivery of video content.

The *Order* finds that franchising negotiations that extend beyond the time frames created today by the Commission amount to an unreasonable refusal to award a competitive franchise within the meaning of 621(a)(1). This finding ignores the plain reading of the first sentence of section 621(a)(1), which provides that a franchising authority "may not *unreasonably refuse to award* an additional competitive franchise."[24] On its face, Section 621(a)(1) does not impose a time limitation on an LFA's authority to consider, award, or deny a competitive franchise. The second and final sentence of section 621(a)(1) provides judicial relief, with no Commission involvement contemplated, when the competitive franchise has been "denied by *a final decision* of the franchising authority."[25] There is no ambiguity here: Congress simply did not impose a time limit on franchise negotiations, as it did on other parts of Title VI (see discussion *infra*). Hence, whether you read the first sentence alone or in context of the entire statutory provision or title, its plain and unambiguous meaning is contrary to the Commission's interpretation. Section 621(a)(1) provides an expressed limitation on the *nature*, not the timing, of the refusal to award a competitive franchise.[26]

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of the "denial" of a franchise application may be appealed, somehow intended, *sub silentio*, to have its own language gutted by allowing parties to bypass the last sentence of § 621(a)(1) entirely and go directly to the FCC." NATOA Comments at 28.

[23] The Senate Report of the 1992 Cable Act concluded that, "[b]ased on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be *encouraged [not required]* to award second franchises. Accordingly, [the 1992 Cable Act,] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises." S. Rep. No. 102-92, at 47 (1991)(emphasis supplied). Thus, an LFA's decision to not grant a franchise need only not be unreasonable.

As one federal district court observed:

> The House version contained a specific list of "reasonable" grounds for denial. H. R. Conf. Rep. No. 102-862, at 168-69 (1992). The Senate version, on the other hand, listed "technically infeasible" and left other reasonable grounds undefined. By choosing not to adopt a federally mandated list of reasonable grounds for denial in favor of an open-ended definition, *Congress intended to leave states with the power to determine the bases for granting or denying franchises, with the only caveat being that a denial must be "reasonable."*

Knology, Inc. v. Insight Communications Co., L.P., 2001 WL 1750839 at * 2 (W.D. Ky. March 20, 2001) (citation omitted) (emphasis supplied).

[24] 47 U.S.C. §541(a)(1) (emphasis added).

[25] *Id.* (emphasis added).

[26] Congressional intent to qualify the nature of an LFA's refusal, not the timing of the refusal, is clear when you consider another provision of Section 621(a). Section 621(a)(4)(A) provides that "franchising authority shall allow (continued...)

Even if I were able to move beyond this *Order*'s facially defective reading of 621(a)(1), the Commission's selection of 90 days as the only reasonable time frame for an LFA to consider the franchise application of a competitive provider that already has rights-of-way access before it is "deemed granted" is demonstrably inconsistent with the overall framework of Title VI, unsupported by the record evidence, and quite arbitrary.

The franchising framework established in Title VI does not support the Commission's decision to select 90 days as the deadline for a default grant – another Commission creation – to become effective.[27] Throughout Part III (Franchising and Regulation) of Title VI, when Congress specifically decided to impose a deadline for LFAs to consider sales of cable systems, modification of franchise obligations, and renewals of existing franchises, in all three instances, Congress chose 120 days.[28] In other sections of the Act, the prevalent time frame Congress imposed on LFAs and the Commission is 180 days.[29] Today, the Commission, without authority, cannot take the place of Congress and impose a tighter time frame than Congress ever contemplated to impose on LFAs in the franchising process. This is well beyond Commission "line-drawing" authority, which requires the Commission to operate within the established framework of the authorizing legislation.

While a 90-day deadline arguably could be considered "reasonable," that is not the statutory standard the Commission is purporting to use as the basis of its authority. We can only define "*unreasonable*" refusal,[30] which could be "foot-dragging" or "stonewalling" that amounts to a *defacto* denial of a franchise application. This is not the same as establishing an arbitrary, inflexible 90-day time frame, which overlooks the fact that 120 or 180 days may be reasonable under certain circumstances. While the Commission has line-drawing authority in some cases, the position taken in the *Order* is untenable on its face, given that Congress set a 120-day deadline for franchise transfers, which tend to be simpler than awarding new franchises, unless one is willing to assert that Congress itself was unreasonable. The aggressive schedule set here, while understandable and even desirable from a policy perspective, is evidence of the legislative nature of the *Order*.

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the applicant's cable system *a reasonable period of time* to become capable of providing cable service to all households in the franchise area." In that case, Congress explicitly qualified timing, not the scope of buildout. As demonstrated in the Order, the Commission's attempt to super-inflate the meaning of "unreasonably refuse" in 621(a)(1), and diminish the significance of "unreasonable period of time" in section 621(a)(4)(A) is transparently inconsistent and blatantly self-serving.

[27] The *Order* imposes a time limit of 90 days on LFAs to decide franchise applications from entities that already have access to public rights-of-way and a time limit of six months for applicants that are not already authorized to occupy the rights-of-way. Such a distinction does not exist in Title 6, notwithstanding the fact that Congress specifically contemplated phone companies – entities that already have access to public rights-of-way – obtaining franchises to provide video service.

[28] 47 U.S.C. § 537 (providing LFAs 120 days to act upon request for approval of sale or transfer on cable systems); 47 U.S.C. § 545 (providing LFAs 120 days to modify franchise obligations); and 47 U.S.C. § 546 (providing LFAs a "4-month period" to "renew the franchise or, issue a preliminary assessment that the franchise should not be renewed").

[29] *See, e.g.*, 47 U.S.C. § 543 (authorizing the Commission to "ensure that the rates for the basic service tier are reasonable" and requiring the Commission to develop regulations in 180 days).

[30] 47 U.S.C. § 541(a)(1). Today's *Order* specifically adopts rules that prohibit franchising authorities from "*unreasonably* refusing" to award competitive franchises. *Order* at ¶ 1.

To make matters worse, the Commission-created 90-day shot clock seems to function more like a waiting period, during which time the new entrant has little incentive to engage in meaningful negotiations. An objective review of the evidence shows that there is sufficient blame on both sides of the negotiation table. Sometimes, there are good reasons for delay; and at other times, one side might stall to gain leverage.[31] While the majority is certainly aware of these tactics, they fail to even mention the need for LFAs and new entrants to abide by, or so much as to have, reciprocal good faith negotiation obligations. The majority also has ignored the apparent need to develop a complaint or grievance mechanism for the parties to ensure compliance. Perhaps Congress might consider imposing on the Commission a binding deadline to resolve complaints, which would inject an incentive for both sides to negotiate, meaningfully and in good faith.[32]

Without anything other than the asserted authority to interpret "unreasonably refuse," the Commission creates a regulatory reprimand for an LFA's failure to render a final decision within the Commission-created time limits. The consequences of the failure to reach agreement within 90 days is that the LFA will be deemed to have granted the competitive entrant an interim franchise based on the terms proposed in the entrant's franchise application. In practicality, this will confer rights-of-way access over local property. In selecting this remedy, the Commission purportedly "seeks to provide a meaningful incentive for local franchising authority to abide by the deadlines contained in the *Order*."[33] While the policy goal is understandable and arguably consistent with congressional intent to encourage the award of competitive cable franchises, we do not have legal authority to establish punitive, one-sided consequences, in order to create an "incentive." Moreover, the Commission ignores that by establishing a default grant of franchise applications effectively confers local property rights unilaterally and without regard for inherent local police powers and public health, safety and welfare.

The Commission cites no credible authority that empowers it to deem a new entrant's franchise application granted by the LFA and thus confer local property rights.[34] When construing a statute, principles of construction caution against any interpretation that may contravene existing law or U.S. Constitution. In this case, I am wary of a federal agency, which purports not to preempt any state-based

[31] As the July 11, 2006, filing of the Greater Metro Telecommunications Consortium, the Rainer Communications Commission and the City of Tacoma, Washington explained: "[I]t is an oversimplification to believe that competitive entry into video programming can be facilitated by requiring a local government to act on a franchise application within a specific period of time. What the Commission may consider a delay is often a reasonable time for consideration, and indeed, the internal bureaucracies within many large companies often times dwarf the internal processes within local government, so that any rule the Commission might deem appropriate to apply regarding time to respond, must also be imposed upon the other party to negotiations."

[32] The Commission purposefully stops short of creating reciprocal good faith obligations because that would authorize the parties to file a complaint with the Commission when negotiations fall apart. Such a complaint process would effectively serve as an enforcement mechanism, which would only increase this *Order*'s litigation exposure as quasi-legislative document. Nevertheless, today's *Order* cannot be reasonably viewed as mere guidance to LFAs or a clarification of the term "unreasonably refuse" in section 621(a)(1). There is a real, punitive consequence if the LFA does not follow the Commission's dictates – a "deemed granted" franchise, which incurably alters the dynamics of franchise negotiations.

[33] *Order* at ¶ 76.

[34] The Commission's reliance on ancillary authority it exercised in the early 1970s, well before congressional enactments in 1984, 1992 and 1996, is unavailing. In fact, such reliance reveals the Commission's need to make too large a reach to justify it actions. *See* Letter from James L. Casserly, Counsel for Comcast Corporation, to Marlene Dortch, Federal Communications Commission , MB Docket No. 05-311 (filed December 13, 2006).

franchising law, but yet is prepared to step into the shoes of an LFA – an instrumentality of the state – to grant a franchise application with all the attendant rights-of-way privileges.[35]

The Commission rejected an approach that would have deemed an application "denied" once the shot clock expired without LFA action. This approach, I maintain, would have expedited the judicial review that was Congress' chosen remedy, and is infinitely more consistent with the letter and spirit of the Communications Act, Title VI, and specifically sections 621(a)(1) and 635. Nowhere in the Act is the Commission granted the authority to force localities to grant franchises. Simply put, the Commission's "deemed granted" approach in the *Order* is not a justifiable choice to fill the perceived gap left open by Congress when it did not provide a specific remedy against LFA action that is short of an outright denial of a franchise application. While it is generally proper for the Commission to exercise its "predictive judgment," that is only when the Commission has the requisite authority to act within a certain area and it stays within its authority. Neither exists in this case.

In terms of build-out, the Commission seems to make a deliberate effort to overlook the plain meaning of the statute and to substitute its policy judgment for that of Congress. The Commission concludes that it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of an applicants' refusal to agree to any build-out obligations. The Commission's analysis in this regard is anemic and facially inadequate.

Section 621(a)(4)(A) provides that "[i]n awarding a franchise *the franchising authority* shall allow the applicant's cable system a *reasonable period of time* to become capable of providing cable service to all households in the franchise area." Absent express statutory authority, the Commission cannot declare it unreasonable for LFAs to require build-out to all households in the franchise area over a reasonable period of time. The Commission's argument in this regard is particularly spurious in light of the stated objective of this *Order* to promote broadband deployment and our common goal of promoting affordable broadband to all Americans. In the end, this is less about fiber to the home and more about fiber to the McMansion.

The Commission is correct on one point, that section 621(a)(4)(A) is actually a limitation on LFA authority. However, consistent with plain reading of the provision and its legislative history, Section 621(a)(4)(A) surely is not a grant of authority to the Commission and does not impose a limitation on the *scope* of a competitive provider's build-out obligations. Indeed, section 621(a)(4)(A) explicitly limits the "period of time" to build-out, but an LFA is unrestrained to impose full, partial, or no build-out obligations on all cable service providers. As long as an LFA gives a competitive provider "a reasonable period of time to become capable of providing cable service to all households in the franchise area," section 621(a)(4)(A) essentially shields build-out requirement from constituting an "unreasonable refusal" to grant a competitive franchise. While this policy could be changed by Congress to facilitate competitive entry, that is not the current state of the law. An LFA cannot be prohibited from requiring build-out to all households in the franchise area if an LFA allows "a reasonable period of time" to do so. The Commission has not been ordained with a legislative "blue pencil" to rewrite law. Congress specifically directed LFAs – not the FCC – to allow a reasonable period of time for build-out. As much as the Commission would like it be its role, Congress gave the role to LFAs, and it is Congress' purview to modify that explicit delegation of authority.

[35] *See generally*, Charter Communications v. County of Santa Cruz, 304 F.3d 927 (9th Cir. 2002) (holding that deference is accorded to legislative action of local government), especially in light of fact that the Commission does not have clear congressionally delegated authority in this case; and local regulations, in this case, are likely explicitly sanctioned by the Cable Act and consistent with the express provisions of the Act, *see* 47 U.S.C. § 556(a).

Assuredly, Section 621(a)(4)(A) does not impose "universal" or "uniform" build-out requirements on franchise applicants. This may be a reflection of congressional intent to focus on the needs of the locality.[36] However, it does not prohibit LFAs from requiring build-out obligations as a condition of franchise approval, so long as the competitive applicant is given a reasonable period of time.

The rapid deployment of broadband has been a goal of mine since I joined this Commission. Wireline competition in the video market, particularly, is critical as a means to constrain prices, which in itself is a worthy goal after year upon year of price hikes. It is also critical to the future of our democracy that Americans have access to as many forms of video content as possible so they can make up their own minds about the issues of the day and not remain subject to a limited number of gatekeepers who decide what deserves airing based on their own financial or ideological interests. But, in order for the Commission to promote these goals effectively, we must operate within our legal authority.

Perhaps the majority has failed to consider the real life consequences of today's *Order*. For instance, in New York City, competitive entrants could file the Commission-mandated informational filing that proposes to serve only Broadway, Madison, or Park Avenue. Under today's *Order*, the New York City franchising authority would be forbidden from denying the competitive franchise based solely on the fact that the new entrant refuses to certain build-out requirements. The LFA is placed in the difficult position of either denying outright the franchise and absorb the costs and fees for the ensuing litigation, or agree to a franchise that is not responsive to needs and interests of local community.

How can the majority declare build-out to be an impediment to entry when one of the major incumbent phone companies, AT&T, claims that it does not need a franchise to operate its video service, and the other, Verizon, has agreed to different, but favorable, build-out obligations with various states and localities? Under the federalist scheme of the Act, different jurisdictions can choose models that best suit their specific needs. For example, in New Jersey, the state-wide franchise reform law correlates build-out principally to population density, while build-out obligations in Virginia principally track the entrant's existing wireline facilities. And in New York City, Verizon and the LFA were actively negotiating universal build-out over a period of a few years.

The broad pen with which the majority writes today's *Order* does not stop with build-out. The *Order* also uses the Commission's alleged authority under Section 621(a)(1) to determine that any LFA refusal to award a competitive franchise because of a new entrant's refusal to support PEG or I-Net is *per se* unreasonable. Although the *Order* purports to provide clarification with respect to which franchise fees are permissible under the Act, it muddles the regime and leaves communities and new entrants with conflicting views about funding PEG and I-Net. Indeed, Congress provided explicit direction on what constitutes or does not constitute a franchise fee, with a remedy to the courts for aggrieved parties.

Today's Order should make clear that, while any requests made by an LFA unrelated to the provision of cable service *and* unrelated to PEG or I-NET are subject to the statutory five percent franchise fee cap, these are not the type of costs excluded from the term "franchise fee" by section 622(g)(2)(C). That provision excludes from the term "franchise fee" any "capital costs that are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities." The legislative history of the 1984 Cable Act clearly indicates that "any franchise requirement for the provision of services, facilities or equipment is not included as a 'fee.'"[37]

[36] *See* 47 U.S.C. § 521 (2)(stating that the one of the central purposes of Title 6 is to "assure that cable systems are responsive to the needs and interests of the local community.") *See also* 47 U.S.C. § 521(3)(stating that another central purpose of Title 6 is to establish clear federal, state and local roles).

[37] The legislative history of 1984 Cable Act provides "in general, [section 622(g)(2)(C)] defines as a franchise fee only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirement for

(continued...)

PEG facilities and access provide an important resource to thousands of communities across this country. Equally important, redundancy or even duplicative I-Net provides invaluable homeland security and public health, safety and welfare functions in towns, cities, and municipalities across America. It is my hope that today's decision does not undermine these and other important community media resource needs.

While my objections to today's *Order* are numerous and substantial, that should not overlook the real need I believe there is for franchise reform. Indeed, there is bipartisan support for reform in Congress, and most LFAs throughout this country are committed to bring video competition to their jurisdictions. My fundamental concern with this *Order* is that it is based on such paper-thin jurisdiction, but it is truly broad in scope. It ignores the plain reading of the section 621, usurps congressional prerogative and pre-empts LFAs in certain important respects that directly contradict the Act.

The sum total here is an arrogant case of federal power riding roughshod over local governments. It turns federalism on its head. While I can support certain efforts to streamline the process and preclude local authorities from engaging in unreasonable practices, this item blatantly and unnecessarily tempts the federal courts to overturn this clearly excessive exercise of the limited role afforded to us by the law. The likely outcome of being reversed in Federal Court could have pernicious and unintended consequences in limiting our flexibility to exercise our discretion in future worthy endeavors.

Accordingly, I dissent.

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the provision of services, facilities or equipment. As regards PEG access in new franchises, payments for capital costs required by the franchise to be made by the franchise to be made by the cable operator are not defined as fees under this provision." H.R. REP. No. 98-934, at 65 reprinted in 1984 U.S.C.C.A.N. 4702.

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)

Today's item, like most we address as an expert agency, is full of sophisticated technical, legal, and policy arguments. At a high level, however, I view this as a continuation down a path of deregulatory policies designed to encourage new market entry, innovation, and investment. Indeed, "encourag[ing] more robust competition in the video marketplace" by limiting franchising requirements has long been a stated goal of the Commission as well as a driving force behind statutory terms we interpret today.

Section 621(a)(1) of the Communications Act of 1934, as amended (the "Act"), states that franchising authorities ("LFAs") may not "unreasonably refuse to award" a competitive franchise to provide cable services. I agree with our conclusion that we have the jurisdictional authority to interpret this section of the Act and adopt rules to implement it. In amending Section 621(a)(1) to include the phrase "unreasonably refuse to award," Congress explicitly limited the authority of LFAs. However, if an LFA does not make a final decision for months on end, or perhaps even years as the record indicates, new entrants are given no recourse. Also, unreasonable demands, similar to long delays, serve as a further barrier to competitive entry. It is nonsensical to contend that, despite the limitation on LFA authority in the Act, LFAs remain the sole arbiters of whether their actions in the franchise approval process are reasonable. Since the section's judicial review provision applies only to final decisions by LFAs, absent Commission action to identify "unreasonable" terms and conditions, franchise applicants would have no avenue for redress. I conclude that our broad and well-recognized authority as the federal agency responsible for administering the Act, including Title VI, permits us to identify such terms and conditions, and I support our exercise of that authority.

As with most orders, we explored numerous ways to achieve our goals. I ultimately support today's item, because I believe that, by streamlining timeframes for action and providing practical guidelines for both LFAs and new entrants, the item encourages the development of competition in the video marketplace and speeds the deployment of broadband across the country in a platform-neutral manner. These beneficial policy results should not be underestimated. Our annual reports to Congress on cable prices, including the report we adopt today, consistently show that prices are lower where wireline competition is present. And, of course, broadband deployment enhances our ability to educate our children for the jobs of tomorrow and ensures that the United States remains competitive in this global communications age.

Additionally, I am pleased that we recognize – and do not preempt – the actions of those states that have reformed their franchise rules. Their efforts to streamline the process for competitive entry are laudable.

Finally, it is critical that as we advance pro-competitive policies, we ensure that our policies do not unreasonably create asymmetry in the marketplace. Accordingly, I am encouraged that we resolve to address open issues regarding existing franchise agreements on an expedited basis. I encourage all interested parties to use your energies toward assisting us as we seek a way to apply more broadly our conclusions across all companies.

STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL

Re: In the matter of: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)

I have long advocated the Commission doing all that it can to open new opportunities for entrepreneurs to have the freedom to construct new delivery platforms for innovative new services. More delivery platforms mean more competition. More competition means consumers can choose among more innovative offerings. As consumers become more empowered, prices fall and, as a result, new technologies become more available to help improve the lives of all Americans. In short, creating a de-regulatory environment where competition is given the chance to flourish kicks off a virtuous cycle of hope, investment, growth and opportunity.

Today, the Commission is taking a step forward in what I hope will be a noble quest to spur more competition *across* many delivery platforms and, where appropriate, *within* delivery platforms. While we already have some competition in the video market, American consumers are demanding even more competition. And that's the goal of our action today: more competition through de-regulation. Perhaps President Ronald Reagan foresaw an issue like this one when he said, "We have a healthy skepticism of government, checking its excesses at the same time we're willing to harness its energy when it helps improve the lives of our citizens." That is precisely what we are doing today: checking any government excesses at the local level to unleash free markets which will help improve the lives of all Americans.

This order strikes a careful balance between establishing a de-regulatory national framework to clear unnecessary regulatory underbrush, while also preserving local control over local issues. It guards against localities making unreasonable demands of new entrants, while still allowing those same localities to be able to protect important local interests through meaningful negotiations with aspiring video service providers. Local franchising authorities are still free to deny deficient applications on their own schedule, but we are imposing a "shot clock" to guard against unreasonable delay. After the shot clock runs out, if the locality has not granted or denied the application, an interim or temporary authority will be granted to give the parties more time to reach a consensus. If the LFA feels as though it cannot grant a franchise during this period, they are free to deny the application. And unhappy applicants still have the liberty to go to court, as codified under federal law.

Additionally, should communications companies decide to upgrade their existing non-cable services networks, localities may not require them to obtain a franchise. However, this order does not address whether video service providers can avoid local or federal jurisdiction over those video services because those services are carried over differing protocols, such as Internet protocol. That question is explicitly left for another docket.

In the same spirit of deference to localities, we are not pre-empting recently enacted state laws that make it easier for new video service providers to enter the market. Those important frameworks will remain intact. Similarly, on the important issue of build-out requirements, we preserve local flexibility to implement important public policy objectives, but we don't allow localities to require new entrants to serve everybody before they serve anybody.

Many commenting parties, Members of Congress, and two of my distinguished colleagues, have legitimately raised questions regarding the Commission's authority to implement many of these initiatives. I have raised similar questions. However, as the draft of this item has evolved and, I think, improved, my concerns have been assuaged, for the most part. The Commission has ample general and specific authority to issue these rules under several sections including, but not limited to, sections: 151, 201, 706, 621, 622, and many others. Furthermore, a careful reading of applicable case law shows that the courts have consistently given the Commission broad discretion in this arena. While I understand the concerns of others, after additional study, I feel as though we are now on safe legal ground. But I know that reasonable minds will differ on this point and that appellate lawyers are already on their way to the court house. That is the American way, I suppose.

This order is not perfect. If it were, it would say that all of the de-regulatory benefits we are providing to new entrants we are also providing to <u>all</u> video providers, be they incumbent cable providers, over-builders or others. I want to ensure that no governmental entities, including those of us at the FCC, have any thumb on the scale to give a regulatory advantage to any competitor. But the record in this proceeding does not allow us to create a regulatory parity framework just yet. That's why I am pleased that today's order and further notice contain the tentative conclusion that the relief we are granting to new entrants will apply to <u>all</u> video service providers once they renew their franchises.

Also, I have consistently maintained during my time here that if shot clocks are good for others then they are good for the FCC itself. Accordingly, I am pleased that the Chairman has agreed to release an order as a result of the further notice no later than six months from the release date of this order, and regardless of the appellate posture of this matter. Resolving these important questions soon will give much-needed regulatory certainty to all market players, spark investment, speed competition on its way, and make America a stronger player in the global economy. By the same token, it is no secret that I would also like to see the Commission act more quickly on petitions filed by any individual or industry group, especially if those petitions may help spur competition in any market, be it video, voice, data, wireless, or countless others. We should never let government inaction create market distortions.

I thank my entire staff, especially Cristina Pauzé, for their long hours, dedication and insight regarding this order. I also thank the tireless Media Bureau and the General Counsel's office for their tremendous efforts on this important matter. Lastly, I would like to thank Chairman Martin for his strong leadership on this issue.